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In The

Supreme Court of the United States

October Term, 1963

No. 464

In The Matter of
SADIE H. MARKHAM,
Petitioner.

BRIEF OF RESPONDENT, CITY OF DURHAM, NORTH CAROLINA, IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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INDEX

No Federal Question Is Involved 1

THE SEVEN QUESTIONS ASSERTED BY PETITIONER AS BEING INVOLVED ARE NOT INVOLVED ON THIS PETITION 2, 3, 4

Alternative Courses are available to Petitioner 4, 5

Conclusion 5, 6

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NO FEDERAL QUESTION IS INVOLVED

As stated by Justice Bobbitt of the North Carolina Supreme Court, the question decided by that Court was

> "May a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance so as to change certain property located in Residence and Apartment Residence Zones to a Commercial Business Zone, be reviewed directly by the Superior Court by means of Certiorari directed to the City Council, in the absence of statutory provision for such procedure?"

The Supreme Court of North Carolina, in its Opinion handed down June 14, 1963, and reported in 259 NC 566, 131 SE2d 329, (pp. 5a-15a, Appendix B., Petition for Writ of Certiorari filed by Petitioner) simply held that under the laws of North Carolina the answer to that question is "No".

Such decision does not infringe upon any constitutional or statutory right of Petitioner with regard to the use of her property. Indeed, the North Carolina Supreme Court pointed out (p. 15a, Appendix B.) that appropriate procedures are available to the Petitioner for a judicial determination of the controversy as to whether the zoning ordinance now in effect is invalid as to Petitioner's property.

The decision of the Supreme Court of North Carolina in interpreting the applicable law and answering the foregoing

question is determinative of that question in this case. Certainly, the Petitioner has no right guaranteed by any constitutional provision to require the Court to have answered the question in the affirmative.

Therefore, Respondent respectfully submits that the Petition for Writ of Certiorari filed by Petitioner should be denied.

THE SEVEN QUESTIONS ASSERTED BY PETITIONER AS BEING INVOLVED ARE NOT INVOLVED ON THIS PETITION

Petitioner lists seven questions which she says are presented by her Petition for the Writ. (Petition, pp. 2-3). It is respectfully submitted that not a single one of these questions is actually involved or before this Court on the Petition for the Writ for these reasons:

Questions, 1, 2 and 3 have no reference whatever to the question decided by the North Carolina Supreme Court, whose Opinion is here sought to be reviewed. These questions go to the contention of Petitioner that the action of the Durham City Council was arbitrary, etc., and therefore invalid, *which questions were not reached or passed upon* by the North Carolina Supreme Court.

However, even if such questions were before the Court *there was evidence sufficient to sustain the action of the City Council* as against charges of arbitrary, capricious, unreasonable and confiscatory action levelled against it. For example, the zoning ordinance was before the Council and the Court (Ex. 45). Also before the Council and the Court as Ex 1-C was a map showing Petitioner's four tracts of land here involved. Tracts 1 and 3 are in R-8 Residential Zone and Tracts 2 and 4 are in RA-16-24 Apartment Zone. (Rp 10). From these facts which are before the Court it is shown by computation, according to sections 3 and 4 of R-10 and R-8 required lot area of the zoning ordinance, that

(a) on Tract 1, one single family residence can be erected

fronting Watts Street and another single family residence can be erected fronting Buchanan Boulevard, so that there is sufficient room on the lot on which *two* single family residences can be built on this tract in compliance with the zoning ordinance.

(b) on Tract 3, containing 3.5 acres and fronting about 640 feet along Watts Street and 516 feet along Buchanan Boulevard, by reference to the same section of the ordinance it is shown that the area is sufficient to be cut into 13 separate lots upon which *thirteen* single family residences may be built in compliance with the zoning ordinance.

Also, by reference to section 9 of the zoning ordinance, RA-16-24 Apartment Residence Zone, and a specific reference to subsection C thereof relating to density, it is shown that

(c) on Tract 2 there can be constructed a *10-unit apartment* building, or, with smaller units, a *15-unit apartment* building, complying with the zoning requirements;

(d) While on Tract 4, a reference to the same section shows that from *20 to 30 apartment units* can be erected in compliance with the zoning ordinance.

These facts were before the City Council, and they do not bear out the contention of Petitioner that her property is "valueless for residential purposes", and that the action of the City Council in not changing the zone was arbitrary, capricious, unreasonable, confiscatory, and unconstitutional. At the very least, the question is fairly debatable.

Question 4 ignores the fact that Petitioner has no constitutional or statutory right to require the Court to hold that she may present her case in a way which is contrary to the course and practice of the Courts, and in a way which confers no jurisdiction on the Court to review a decision of a legislative City Council by direct appeal.

Question 5 assumes that the decision of the Supreme Court of North Carolina is erroneous because it "ignored its own

precedents of long standing", and *thereby evaded* a decision on constitutional questions which Petitioner says are involved in the case. Such assumption is untenable because it gives no weight to the effect of North Carolina General Statutes 1-134.1, which provides that any interested party shall have the right of appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant; and ignores the ancient vintage of the cases Petitioner cited (Hillsboro v Smith, 1891; Bank v Burns, 1899) and the fact that none of those cases were zoning cases; and, finally, all of those cases and the statutes were before the North Carolina Supreme Court and due consideration given to them by the Court in reaching its decision. Petitioner could argue, as her counsel did, that the Court should hold that Respondent had no right to be heard on appeal from a ruling of the Superior Court that the Court had jurisdiction, *but she has no constitutional right to require the Court to accept her argument.* The statement that the Court reached the decision it did in order to "evade" a decision on constitutional grounds is pure fantasy.

Question 6 asserts that the decision was based on "untenable grounds", etc., all of which is pure argument and wishful thinking on the part of counsel for Petitioner. Here, again, there is no constitutional right of Petitioner infringed upon by the disenchantment of the Court with her contentions.

Question 7 erroneously assumes that the decision of the North Carolina Supreme Court requires Petitioner to violate the ordinance in order to obtain a judicial determination of her rights. Nothing in that Opinion justifies such assumption. The Court suggests that there are appropriate procedures available to her, and nowhere does it advise her to violate the law before such procedures may be available.

On this point, it is well to note that Petitioner has cited and places great reliance upon the case of *Nectow v Cambridge*, 277 U. S. 183 (1928), which she says involves identical facts. Since she is apparently wedded to that case, she might follow the same procedure which was followed there; and,

instead of trying to appeal to the Courts directly from the legislative action of a city council and trying to force the Court to assume jurisdiction which it does not have, she might, as was done in the *Nectow* case, institute a suit for a mandatory injunction directing the City and its inspector of buildings to pass upon an application of plaintiff in error for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a residential zone. (And it might be of interest to point out that in that case the matter was referred to a Master, who, after hearing the evidence, made certain findings of fact, which the Court adopted on appeal).

Thus, it is demonstrated that, instead of being authority in support of Petitioner, the *Nectow* case is authority for the position of Respondent that the way for Petitioner to proceed was (1) to institute a suit for a mandatory injunction for a building permit, or (2) for an injunction restraining the City from enforcing the zoning ordinance as to Petitioner's property on the ground that as to her the ordinance is invalid and unenforceable, or (3) for Petitioner to start building a commercial building and have the City institute an action to enjoin her from doing so. At least two of these available procedures do not require the Petitioner to violate the ordinance in order to present her case for determination.

CONCLUSION

It is respectfully submitted

(1) That the decision of the North Carolina Supreme Court that a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance as requested by Petitioner, may not be reviewed directly by the Courts by means of Certiorari directed to the City Council in the absence of statutory provision for such procedure, is determinative of the question.

(2) That no Federal question is involved which calls for

review of the decision of the North Carolina Court by this Court.

(3) That there are available procedures open to Petitioner to secure a judicial determination of her right to use her property for commercial purposes, if she desires to make use of them.

(4) That the Court should deny the Petition for the Writ filed by Petitioner herein.

Respectfully submitted,

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